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November 8, 2004

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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: WC Docket No. 04-30 – Emergency Request for Declaratory Ruling – Additional Ex Parte Filing By Gemini Networks CT, Inc.**

Dear Ms. Dortch:

Enclosed on behalf of Gemini Networks CT, Inc. (“Gemini”) are copies of Gemini’s (a) the Motion To Intervene, (b) Memorandum In Support Thereof and (c) Answer filed by Gemini in response to the lawsuit brought by SBC Connecticut (“SBC”) in the United States District Court for the District of Connecticut against the Connecticut Department of Public Utility Control and the Commissioners thereof. CIV Action No. 3:04-CV-01675-RNC. As noted in Gemini’s Motion, SBC Connecticut has no objection to Gemini’s intervention in the case; nor do any of the other parties. Therefore, Gemini would expect that the Court would grant its Motion in due course.

Gemini notes that SBC has filed this Federal lawsuit despite earlier formally indicating to the Connecticut Superior Court that the FCC had primary jurisdiction over the matters raised by the Petition that SBC originally filed at the FCC. Gemini would expect to bring this previous concession by SBC to the Federal District Court at the appropriate time, in addition to pursuing the other special defenses raised by Gemini in its Answer.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Paul C. Besozzi', with a long horizontal flourish extending to the right.

Paul C. Besozzi  
Counsel for Gemini Networks CT, Inc.

PCB:tmc

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

THE SOUTHERN NEW ENGLAND )  
TELEPHONE COMPANY, d/b/a SBC )  
CONNECTICUT, )

Plaintiff )

vs. )

THE CONNECTICUT DEPARTMENT OF )  
PUBLIC UTILITY CONTROL; )  
DONALD W. DOWNES, JACK R. )  
GOLDBERG, JOHN W. BETKOSKI, III, )  
LINDA J. KELLY and ANNE C. GEORGE )  
in their official capacities as Commissioners )  
of the Connecticut Department of Public )  
Utility Control, )

Defendants )

CIVIL ACTION NO.  
3:04-CV-01675-RNC

NOVEMBER 3, 2004

**MOTION TO INTERVENE OF GEMINI  
NETWORKS CT, INC. IN OPPOSITION  
TO PLAINTIFF'S COMPLAINT**

Pursuant to Rule 24(a), or, in the alternative, Rule 24(b) of the Federal Rules of Civil Procedure, Gemini Networks CT, Inc. ("Gemini") hereby moves this Court for leave to intervene as a defendant in the above-captioned proceeding in opposition to the plaintiff's Complaint for

ORAL ARGUMENT NOT REQUESTED

Declaratory and Injunctive Relief. Specifically, Gemini requests that this Court afford it an opportunity to be heard in order to challenge the subject matter jurisdiction of this court and/or defend the validity of the decisions and orders issued by the defendant Connecticut Department of Public Utility Control ("DPUC") in its Decisions dated December 17, 2003 and August 25, 2004 that are the subject of this action. Decision, Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements, December 17, 2003 ("*Gemini Decision*") (attached to plaintiff's Complaint as Exhibit B); Decision, Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding the Southern New England Telephone Company's Unbundled Network Elements – Feasibility Determination, August 25, 2004 ("*Remand Decision*") (attached to plaintiff's Complaint as Exhibit G).

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure as follows:

- (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
- (b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense or the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In support of this Motion, Gemini states as follows:

1. Gemini is a Delaware corporation, registered to do business in the State of Connecticut, and is licensed to provide telecommunications services throughout the State of Connecticut as a competitive local exchange carrier ("CLEC").

2. At all times pertinent, the plaintiff, The Southern New England Telephone Company d/b/a SBC Connecticut ("SBC"), was a Connecticut corporation engaged in the business of providing telecommunications services within the State of Connecticut.

3. At all times pertinent, SBC qualified as an incumbent local exchange carrier ("ILEC") in Connecticut pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 251(h).

4. On October 5, 2004, plaintiff filed a Complaint for Declaratory and Injunctive Relief seeking a declaration that the defendant members of the DPUC be enjoined from enforcing the terms of the Orders issued pursuant to Conn. Gen. Stat. §§ 16-247a and 16-247(b) and 47 U.S.C. 251 and 252 requiring SBC to offer unbundled access to its abandoned hybrid-fiber coaxial ("HFC") telecommunications network to CLECs such as Gemini.

5. Gemini has a substantial and significant interest in this action as a CLEC seeking to provide services to residents and businesses in Connecticut.

6. Gemini brought the initial administrative action before the DPUC that is the subject of the proceeding, was designated as a party, and was actively involved in that proceeding, the subsequent appeal of that proceeding and the remand of that proceeding.

7. In fact, in its Complaint in this action, SBC refers to the DPUC's Order as the "Gemini Decision."

8. Unbundled access to the HFC network is critical and necessary to permit CLECs, such as Gemini, to enter the Connecticut local exchange market and to promote full and effective competition with SBC, the overwhelmingly predominant ILEC in the Connecticut

local exchange market. The lack of unbundled access to the HFC network would impose significant and unnecessary costs and administrative burdens on Gemini and other CLECs that would impede their ability to enter the local exchange market in Connecticut and would also result in the duplication of facilities, contrary to law.

9. Gemini's Motion to Intervene is timely.

10. Gemini's interests as a private corporation may not be adequately represented by the existing parties to this action, whose primary responsibility and obligation is to the Connecticut public.

11. Gemini's interests will be significantly impaired if the requested declaratory and injunctive relief is granted. If not ordered by the DPUC, SBC's refusal to provide unbundled access to the abandoned HFC network constitutes a barrier to entry and effectively forecloses interconnection through unbundled network elements as a viable option for Gemini to enter the Connecticut local exchange market. In addition, SBC would obtain an unfair and unwarranted competitive advantage over Gemini and other CLECs in contravention to the pro-competitive goals of the Telecommunications Act of 1996, the state, and the goals of the DPUC, especially since the abandoned HFC network is occupying the last usable space on many utility poles within the State of Connecticut.

12. Gemini's intervention will not unduly delay adjudication of the parties' claims.

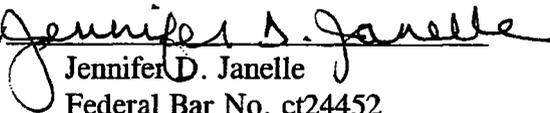
13. Counsel for plaintiff, defendants and moving intervening defendants have been contacted and have stated that they have no objection to Gemini's intervention.

14. Gemini's Answer is attached as Exhibit A.

WHEREFORE, Gemini respectfully requests that the Court grant the Motion to Intervene of Gemini Networks CT, Inc.

Respectfully Submitted,

GEMINI NETWORKS CT, INC.

By 

Jennifer D. Janelle

Federal Bar No. ct24452

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Its Attorney

CERTIFICATE OF SERVICE

This is to certify that on this the 3<sup>rd</sup> day of November, 2004, a copy of the foregoing Motion To Intervene Of Gemini Networks CT, Inc. In Opposition To Plaintiff's Complaint was mailed, via U.S. mail, postage prepaid, to:

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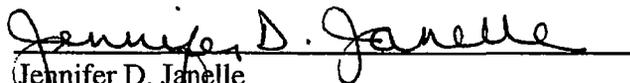
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UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

THE SOUTHERN NEW ENGLAND )  
TELEPHONE COMPANY, d/b/a SBC )  
CONNECTICUT, )

Plaintiff )

vs. )

THE CONNECTICUT DEPARTMENT OF )  
PUBLIC UTILITY CONTROL; )  
DONALD W. DOWNES, JACK R. )  
GOLDBERG, JOHN W. BETKOSKI, III, )  
LINDA J. KELLY and ANNE C. GEORGE )  
in their official capacities as Commissioners )  
of the Connecticut Department of Public )  
Utility Control, )

Defendants )

CIVIL ACTION NO.  
3:04-CV-01675-RNC

NOVEMBER 3, 2004

**MEMORANDUM OF LAW IN**  
**SUPPORT OF MOTION TO INTERVENE**

By motion filed herewith, Gemini Networks CT, Inc. ("Gemini") moves to intervene in the pending action. Intervention is necessary because Gemini is the petitioner in the underlying administrative proceeding and therefore has a cognizable legal interest in the

outcome of this case. Because Gemini satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24 and the Connecticut Department of Public Utility Control ("DPUC"), the Connecticut Office of Consumer Counsel ("OCC") and SBC Connecticut, all consent to this intervention, this Court should permit Gemini to intervene.

All of the parties to this action have been consulted and consent to this motion.

I. STATEMENT OF RELEVANT FACTS

On October 5, 2004, the Southern New England Telephone Company d/b/a SBC Connecticut ("SBC") filed a Complaint for Declaratory and Injunctive Relief with this Court seeking to preempt the "DPUC" from enforcing its orders contained in two decisions ("Decisions"), requiring SBC to provide unbundled access to certain portions of SBC's hybrid-fiber coaxial ("HFC") network.

The Decisions at issue in this proceeding arose out of a petition filed at the DPUC on January 2, 2003 by Gemini (the "Petition"). In its Petition, Gemini requested that the DPUC declare SBC's HFC network to be subject to unbundling pursuant to state and federal law in order that Gemini may obtain leased access to the HFC network. The DPUC ruled in its Decisions that the HFC network is subject to unbundling and ordered SBC to negotiate an interconnection agreement with Gemini for access to the HFC network elements.

Gemini, as the petitioner, was a full party to the underlying administrative proceeding at the DPUC. Gemini was also admitted as an intervenor in SBC's appeal to the Connecticut Superior Court. Gemini was a full party to the DPUC proceeding on remand from the Superior Court. Gemini has also filed comments and participated in the proceeding currently pending before the Federal Communications Commission.

## II. LEGAL STANDARD

Fed. R. Civ. P. 24 provides that

upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This rule is interpreted liberally and presumptions are drawn in favor of the intervenor. See United States v. Union Elec. Co., 64 F.3d 1152, 1158 (8th Cir. 1995). Courts have simplified the rule into a four-part analysis: 1) whether the motion is timely; 2) whether the applicant has a cognizable interest; 3) whether the action will adversely affect the applicant's interest; and 4) whether other parties adequately represent the applicant's interest. See, e.g.,

United States v. City of New York, 198 F.3d 360, 364 (2nd Cir. 1999); New York News, Inc. v. Kheel, 972 F.2d 482, 485 (2nd Cir. 1992).

III. INTERVENTION IS APPROPRIATE IN THIS CASE

Intervention is appropriate in this case because it is the only viable method of ensuring that Gemini's interests are protected in this action. Gemini satisfies the necessary criteria for intervention under Fed. R. Civ. P. 24 and intervention serves the purpose of judicial economy by bringing together all persons with a legal interest in the unbundling of the HFC network involved in the myriad of prior proceedings. The four-part test for as-of-right intervention set forth above is met in this case. Timeliness is evaluated under the totality of the circumstances and considers factors such as the length of time the applicant knew about its interest, prejudice to existing parties, prejudice to the applicant if the motion is denied, and unusual circumstances weighing for or against timeliness. See United States v. Pitney Bowes, Inc., 25 F.3d 66, 70 (2nd Cir. 1994); Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric., 847 F.2d 1038, 1044 (2nd Cir. 1988). Gemini has timely moved to intervene. Furthermore, the existing parties will benefit from this intervention because all parties necessary for granting full relief will then be part of this proceeding. If Gemini is not permitted to intervene, it will be severely prejudiced as it will be unable to adequately protect

its interest in the lease of the HFC network elements and ongoing negotiation of its interconnection agreement. However, as evidenced by their consent to this motion, none of the parties will be prejudiced by this intervention.<sup>1</sup>

To satisfy the intervention criteria, an applicant's interest must be "direct, substantial and legally protectable." City of New York, 198 F.3d at 365; Kleissler v. U.S. Forest Serv., 157 F.3d 964, 972 (3rd Cir. 1998) ("[I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought.") As the initial petitioner in the DPUC proceeding and the party to which the DPUC has ordered SBC to provide unbundled access to its HFC network elements, Gemini clearly has a direct legal interest in the outcome of this proceeding. This interest in access to the HFC network elements is well-defined by the DPUC Decisions finding that Gemini's business would be seriously harmed, if not destroyed, by SBC's failure to provide Gemini with access to the HFC network elements. Gemini's interest would be extinguished if SBC prevails in this case.

Moreover, the impairment to the applicant's interest "must be attributable to the court's disposition of the suit in which intervention is sought." City of New York, 198 F.3d

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<sup>1</sup> Gemini is aware of the scheduling orders in place for this case and is willing to work

at 366. Without intervention, Gemini's ability to protect its interest in access to the HFC network elements undoubtedly would be impaired. If successful in this case, SBC would have no obligation to provide access to the HFC network elements to Gemini on an unbundled basis.

Finally, an applicant is not adequately represented if he can demonstrate "that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10 (1972). Gemini is not adequately represented in this matter. Although the Connecticut Department of Public Utility Control is defending this action and the Connecticut Office of Consumer Counsel has sought to intervene, Gemini's interests differ from those of the state agencies because the primary goal of those agencies is to protect the public interest. No party to the action adequately represents Gemini's commercial and competitive interests in access to the HFC network elements.

#### IV. CONCLUSION

Gemini has a protectable legal interest in unbundled access to the HFC network elements. If SBC is successful in this action, Gemini's interest will be extinguished.

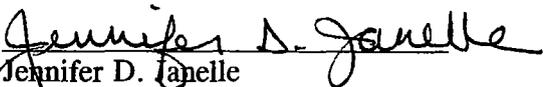
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within the existing timelines.

Intervention in this proceeding will allow Gemini to argue competitors' rights to access to the HFC network elements, thereby allowing it to protect its interest. Because Gemini satisfies the criteria for intervention as of right, it respectfully requests that this Court grant its motion and allow it to defend its interests.

Respectfully Submitted,

GEMINI NETWORKS CT, INC.

By: 

Jennifer D. Janelle

Federal Bar No. ct24452

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Its Attorney

CERTIFICATE OF SERVICE

This is to certify that on this 3<sup>rd</sup> day of November, 2004, a copy of the foregoing Memorandum of Law in Support of Motion to Intervene was mailed, via U.S. mail, postage prepaid, to:

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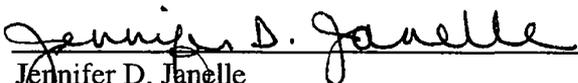
  
Jennifer D. Janelle

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

THE SOUTHERN NEW ENGLAND	)	
TELEPHONE COMPANY, d/b/a SBC	)	
CONNECTICUT,	)	
	)	
	)	
Plaintiff	)	CIVIL ACTION NO.
	)	3:04-CV-01675-RNC
	)	
vs.	)	
	)	
THE CONNECTICUT DEPARTMENT	)	
OF PUBLIC UTILITY CONTROL;	)	
DONALD W. DOWNES, JACK R.	)	
GOLDBERG, JOHN W. BETKOSKI, III,	)	
LINDA J. KELLY and ANNE C.	)	
GEORGE in their official capacities as	)	
Commissioners of the Connecticut	)	
Department of Public Utility Control,	)	
	)	
Defendants	)	NOVEMBER 3, 2004

ANSWER

Pursuant to Rule 24(c) of the Federal Rules of Civil Procedure<sup>1</sup>, Gemini Networks CT, Inc. ("Gemini"), submits the following as its Answer to the plaintiff's Complaint in the above-captioned matter. Gemini has concurrently filed a Motion to Intervene in conjunction with this pleading.

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the same meaning as set forth in the plaintiff's Complaint.

1. Gemini admits that the first and last sentences of paragraph 1 are a description of the plaintiff's action. The allegations of the remainder of paragraph 1 are denied.

2. Gemini is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and leaves the plaintiff to its proof.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is admitted.

6. Paragraph 6 is admitted.

7. Paragraph 7 is admitted.

8. Paragraph 8 is admitted.

9. Paragraph 9 is denied.

10. Paragraph 10 is admitted.

11. Gemini is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 and leaves the plaintiff to its proof.

12. To the extent that paragraph 12 attempts to paraphrase the Telecommunications Act of 1996 (the "Act"), these are legal conclusions to which no reply is necessary. The statutes speak for themselves. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the allegations.

13. To the extent that paragraph 13 alleges that Section 153(29) of the Act states, in part, "network element" and "a facility or equipment used in the provision of a telecommunications service," it is admitted. To the extent that paragraph 13 alleges that Conn. Gen. Stat. § 16-247a(b)(7) states "'Network elements' means 'network elements,' as defined in 47 USC § 153(a)(29)," it is admitted. To the extent that paragraph 13 alleges that 47 USC § 153(46) states "telecommunications service" and "the offering of telecommunications for a fee directly to the public, regardless of the facilities used," it is

admitted. To the extent that the remaining allegations are an attempt to paraphrase the Act, these are legal conclusions to which no reply is necessary. The statutes speak for themselves. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

14. To the extent that paragraph 14 alleges that Section 251(c)(3) of the Act states, in part, "nondiscriminatory" and "on an unbundled basis," it is admitted. To the extent that paragraph 14 alleges that Section 251(d)(1)(A) of the Act states, in part, "based on the cost," "of providing" and "reasonable profit," it is admitted. To the extent that the remaining allegations are an attempt to paraphrase the Act, these are legal conclusions to which no reply is necessary. The statute speaks for itself. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

15. To the extent that paragraph 15 alleges that Section 251(d)(2)(b) of the Act states, in part, "impair" and "determining what network elements should be made available," it is admitted. To the extent that paragraph 15 alleges that Section 251(d)(3)(B) of the Act states, in part, "consistent with" and "substantially prevent implementation of," it is admitted. To the extent that paragraph 15 alleges that the 3<sup>rd</sup> Circuit decision states, in part, "Congress validly terminated the states' role in regulating local telephone competition" and "validly preempted state regulation over competition to provide local telephone service" it is admitted, except that, the last three words of the quote should read "local telecommunications service." To the extent that the remaining allegations are an attempt to paraphrase the Act, the intent of Congress, and the decisions of the D.C. and 3<sup>rd</sup> Circuits, these are legal conclusions to which no reply is necessary. The statutes and opinions speak for themselves. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

16. To the extent that paragraph 16 alleges that Section 706 (a) of the Act states, in part, “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans,” “by utilizing, in a manner consistent with the public interest, convenience, and necessity” and “regulating methods that remove barriers to infrastructure investments” it is admitted. To the extent that the remaining allegations of paragraph 16 are an attempt to paraphrase the intent of Congress, these are legal conclusions to which no reply is necessary. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

17. To the extent that the allegations of paragraph 17 are an attempt to paraphrase FCC regulations, these are legal conclusions to which no reply is necessary. The FCC regulations speak for themselves. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations. To the extent that paragraph 17 alleges that the *Triennial Review Order* is relevant to this case, “it” is denied.

18. To the extent that the allegations of paragraph 18 are an attempt to paraphrase the FCC’s *Triennial Review Order*, these are legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent that any response is required, Gemini denies the characterization that the *Triennial Review Order* held that CLECs are not impaired without access to facilities used to provide broadband services.

19. To the extent that the allegations of paragraph 19 are an attempt to paraphrase the FCC’s *Triennial Review Order*, these are legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent that any response is required, Gemini denies the characterization that the *Triennial Review Order* held that ILECs have no obligation to unbundle loop facilities that consist of both copper wires and fiber-optic cables. As to the remaining allegations, to the extent that any response is required, Gemini denies the remaining allegations and leaves the plaintiff to its proof.

20. To the extent that paragraph 20 alleges that the *Triennial Review Order* states, in part, “whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs” and “we cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired,” it is admitted. To the extent that the remaining allegations in paragraph 20 are an attempt to paraphrase the *Triennial Review Order*, these are legal conclusions to which no reply is necessary. However, to the extent that any response is required, Gemini denies the allegations and leaves the plaintiff to its proof.

21. To the extent that the allegations in paragraph 21 are an attempt to paraphrase the *Triennial Review Order*, these are legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent any response is required, Gemini denies the allegations and leaves the plaintiff to its proof.

22. To the extent that paragraph 22 alleges that the *Triennial Review Order* states, in part, “consistent with the requirements of section 251” and “‘substantially prevent’ the implementation of the federal regulatory regime,” it is admitted. To the extent that the remaining allegations are an attempt to paraphrase the *Triennial Review Order*, these are legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent any response is required, Gemini denies the remaining allegations and leaves the plaintiff to its proof

23. To the extent that paragraph 23 alleges that the *Triennial Review Order* states, in part, “would blunt the deployment of advanced telecommunications infrastructures by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706,” it is admitted. To the extent that paragraph 23 alleges that the Supreme Court case cited states, in part “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress,” it is admitted except that the first word should be “stands.” To the extent that the remaining allegations are an attempt to paraphrase the *Triennial Review Order* or the Supreme Court case, these are legal conclusions to which no reply is necessary. The *Triennial Review Order* and the Supreme Court case speak for themselves. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

24. To the extent that paragraph 24 alleges that section 251(c)(1) of the Act states, in part, “the particular terms and conditions of agreements to fulfill the duties,” it is admitted. To the extent that the remaining allegations are an attempt to paraphrase the Act, these are legal conclusions to which no reply is necessary. The statute speaks for itself. However, to the extent any response is required, Gemini leaves the plaintiff to its proof and denies the remaining allegations.

25. Gemini admits that SBC constructed an HFC network. Gemini is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 25 and leaves the plaintiff to its proof.

26. Gemini denies the allegations in the first and second sentences of paragraph 26. To the extent that the third sentence of paragraph 26 states that 47 U.S.C. § 153(46) states, in part, “telecommunications service” and “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used,” it is admitted. Gemini is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 26.

27. The allegations contained in the first and third sentence of paragraph 27 are denied. Gemini is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 27 and leaves the plaintiff to its proof.

28. Gemini admits the allegations in the first sentence of paragraph 28. Gemini denies that that HFC network is “retired.” Gemini denies that the cost-based rates applicable to unbundled network elements are “subsidized.” Gemini denies the allegations contained in footnote 11. Gemini admits that its representatives met with SBC representatives. Gemini admits that SBC sent a letter to Gemini alleging that the HFC facilities were not subject to unbundling. Gemini denies all of the remaining allegations contained in paragraph 28.

29. Gemini admits that it filed a Petition for Declaratory Ruling with the DPUC. Gemini denies the remainder of the first sentence of paragraph 29. Gemini admits the remaining allegations of paragraph 29.

30. To the extent that paragraph 30 characterizes the issues associated with unbundling the HFC network to be “fact-intensive” and “complex,” Gemini denies the allegation. To the extent that the last sentence of paragraph 30 characterizes the administrative proceeding before the DPUC as “unnecessary,” Gemini denies the allegation. Gemini admits the remaining allegations of paragraph 30.

31. The allegations of paragraph 31 are admitted.

32. The first two sentences of paragraph 32 are admitted. To the extent that the remaining allegations of paragraph 32 attempt to paraphrase the parties’ comments and briefs in the administrative proceeding before the DPUC and the FCC’s *Triennial Review Order*, these are not pleadings of fact and thus no reply is necessary. The parties’ comments and briefs and the FCC’s *Triennial Review Order* speak for themselves. However, to the extent that a reply is necessary, Gemini denies these allegations.

33. The first sentence of paragraph 33 is admitted. With respect to the remainder of paragraph 33, Gemini Decision speaks for itself.

34. To the extent that paragraph 34 alleges that Gemini Decision states “network element,” “currently used,” “the FCC,” “that unbundled access to network elements that are

'capable of being used' be provided to competitors," "already been deployed and could be placed into service by Gemini," "constructed in part and intended by the Company to provide a full complement of voice data and video services," "the capability existed for provision of those services and as such, the HFC network should be unbundled," and "meets the definition of a 'network element,' and therefore it must be unbundled" it is admitted. To the extent that the remaining allegations in paragraph 34 attempt to paraphrase or interpret Gemini Decision, these call for legal conclusions to which no reply is necessary. Gemini Decision speaks for itself.

35. To the extent that paragraph 35 alleges that Gemini Decision states, in part, "the FCC has required," "be unbundled," and "these components should be unbundled," it is admitted. To the extent that the remaining allegations in paragraph 35 attempt to paraphrase or interpret Gemini Decision, these call for legal conclusions to which no reply is necessary. Gemini Decision speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations.

36. To the extent that paragraph 36 alleges that Gemini Decision states "already determined that the HFC network is a network element that should be unbundled," it is admitted. To the extent that the remaining allegations in paragraph 36 attempt to paraphrase or interpret Gemini Decision, these call for legal conclusions to which no reply is necessary. Gemini Decision speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations.

37. To the extent that paragraph 37 alleges that Gemini Decision states, in part, "the HFC network is a network element that should be unbundled," "Gemini could be impaired operationally if it were required to purchase network facilities that it deems are inferior to that of the HFC network," "imposition of its existing services and requirement that Gemini utilize those services instead of the facilities that Gemini has sought in the

Petition would seriously harm, if not destroy, Gemini's business plan and business," and "require Gemini to utilize UNEs other than the HFC network conflicts with the FCC's finding that lack of access to an ILEC incumbent network element would make entry into a market uneconomic," it is admitted. To the extent that the remaining allegations in paragraph 37 attempt to paraphrase or interpret Gemini Decision, the *Triennial Review Order* and the statutes, these call for legal conclusions to which no reply is necessary. Gemini Decision, the *Triennial Review Order* and the statutes speak for themselves. However, to the extent that a reply is necessary, Gemini denies these allegations.

38. To the extent that paragraph 38 alleges that SBC Connecticut appealed the DPUC's Gemini Decision on January 29, 2004, it is admitted. To the extent that the remaining allegations in paragraph 38 attempt to paraphrase the appeal, the appeal speaks for itself. The allegations contained in footnote 15 are denied.

39. To the extent that paragraph 39 alleges that Judge McWeeny of the Connecticut Superior Court issued a decision in SBC Connecticut's appeal, it is admitted. To the extent that the remaining allegations in paragraph 39 attempt to paraphrase or interpret Judge McWeeny's decision, these call for legal conclusions to which no reply is necessary. Judge McWeeny's decision speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations. The allegations contained in footnote 16 are denied.

40. To the extent that paragraph 40 alleges that the DPUC reopened the docket in response to Judge McWeeny's decision, held two days of hearings, reviewed post-hearing briefs and issued a decision, it is admitted. To the extent that paragraph 40 alleges that the Remand Decision states "it is technically feasible to unbundle," "HFC network subject to federal and state unbundling requirements," "has always placed a premium on network reliability and finds no reason at this time why other than," "employees should have access to

Company facilities,” “the applicable rates and charges that Gemini would incur when,” and “technicians repair, upgrade and maintain the HFC facilities that are located in the communications gain in the public rights of way,” it is admitted. To the extent that the remaining allegations in paragraph 40 attempt to paraphrase or interpret the Remand Decision, these call for legal conclusions to which no reply is necessary. The Remand Decision speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations.

41. Paragraph 41 is admitted. Footnote 18 is denied.

42. To the extent that paragraph 42 alleges that SBC Connecticut filed an Emergency Request for Declaratory Ruling and Preemption with the FCC and that such petition has not been ruled on by the FCC, it is admitted. The remaining allegations in paragraph 42 are denied.

43. To the extent that paragraph 43 alleges that the *Triennial Review Order* states “blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities,” it is admitted. Gemini denies that Connecticut’s HFC facilities are “decommissioned.” To the extent that the remaining allegations in paragraph 43 attempt to paraphrase or interpret the *Triennial Review Order* or other provisions of federal law, these call for legal conclusions to which no reply is necessary. The *Triennial Review Order* and federal law speaks for themselves. However, to the extent that a reply is necessary, Gemini denies these allegations.

44. Paragraph 44 is denied.

45. To the extent that paragraph 45 alleges that the *Triennial Review Order* states “is vital to the long-term growth of our economy as well as our country’s continued preeminence as the global leader in information and telecommunications technologies” and that the USTA II case states “brought into the balance the risk that an unbundling order might

deter investment in such facilities – contrary, as it saw the matter, to the statutory goal of encouraging prompt deployment of ‘advanced telecommunications capability,’ it is admitted.

To the extent that the remaining allegations in paragraph 45 attempt to paraphrase or interpret the *Triennial Review Order*, congressional intent, federal law, or judicial decisions, these call for legal conclusions to which no reply is necessary. They speak for themselves. However, to the extent that a reply is necessary, Gemini denies these allegations.

46. To the extent that paragraph 46 alleges that the *Triennial Review Order* states “consistent with the requirements of section 251” and “‘substantially prevent’ the implementation of the federal regulatory regime,” it is admitted. To the extent that the remaining allegations in paragraph 46 attempt to paraphrase or interpret the *Triennial Review Order*, these call for legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations.

47. Paragraph 47 is denied.

48. To the extent that paragraph 48 alleges that the *Triennial Review Order* states “such a subjective, individualized approach could give some carriers access to elements but not others, and could reward those carriers that are less efficient or whose business plans simply call for greater reliance on UNEs,” and “cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired,” it is admitted. To the extent that the remaining allegations in paragraph 48 attempt to paraphrase or interpret the *Triennial Review Order*, these call for legal conclusions to which no reply is necessary. The *Triennial Review Order* speaks for itself. However, to the extent that a reply is necessary, Gemini denies these allegations. The remaining allegations in paragraph 48 are denied.

49. To the extent that paragraph 49 alleges that the USTA I decision states “no reason to think doing so will bring on a significant enhancement of competition,” it is

admitted. To the extent that paragraph 49 alleges that the USTA II decision states “take into account not only the benefits but also the costs of unbundling (such as discouragement of investment in innovation), in order that its standard be rationally related to the goals of the Act,” it is admitted. To the extent that the remaining allegations in paragraph 49 attempt to paraphrase or interpret these judicial decisions, these call for legal conclusions to which no reply is necessary. These judicial decisions speak for themselves. However, to the extent that a reply is necessary, Gemini denies these allegations.

50. To the extent that paragraph 50 alleges that the USTA I decision states “in the beneficence of the widest possible unbundling,” it is admitted, except that the quote should read “in the beneficence of the widest unbundling possible.” The remaining allegations in paragraph 50 are denied.

### SPECIAL DEFENSES

1. This Court lacks subject matter jurisdiction because the plaintiff’s complaint is barred by (res judicata).
2. This Court lacks subject matter jurisdiction because the issues presented by the plaintiff are not ripe for judicial review. The issues presented by the plaintiff are currently pending before the Federal Communications Commission.
3. The Federal Communications Commission has primary jurisdiction over the issues brought by the plaintiff in its complaint.
4. The Court should abstain from entertaining the plaintiff’s complaint because the plaintiff may obtain review of its federal claims by appealing the decision of the Federal Communications Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 3<sup>rd</sup> day of November, 2004, a copy of the foregoing Answer was mailed, via U.S. mail, postage prepaid, to:

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